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COURT OF CRIMINAL APPEALS
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Case No. PD-0639-18

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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

DAVID R. GRIFFITH,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

On Discretionary Review from the Tenth Court of Appeals, in cause no. 10-14-00245-CR; Direct Appeal in cause number C-35408-CR; County Court at Law, Navarro County, Texas, the Honorable Amanda Putman, presiding.

Appellant's Corrected Opening Brief

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1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES

In accord with Rule 38.1 of the Texas Rules of Appellate Procedure, Appellant provides this Court with this complete list of all interested parties.

Appellate Court	TENTH COURT OF APPEALS
Appellate Panel:	Chief Justice Tom Gray (**dissenting Justice on motion for rehearing**) Justice Rex D. Davis (**authoring Justice**) Justice Al Scoggins
Trial Court:	COUNTY COURT AT LAW FOR NAVARRO COUNTY
Trial Court Judge:	THE HONORABLE AMANDA PUTMAN
Appellant:	DAVID R. GRIFFITH
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2. CITATION TO THE RECORD

The reporter's record is cited to as: [10 RR 23] this hypothetical citation would be to volume 10, page 23. The clerk's record is cited to as: [CR 23] this hypothetical citation would be to page 23 of the one volume clerk's record.

3. STATEMENT CONCERNING ORAL ARGUMENT

This Court granted review on Appellant's second issue but did not grant oral argument. Accordingly, there will be no oral argument in this case. *Griffith v. State*, PD-0639-18 (Tex. Crim. App., Sept. 26. 2018).

4. TABLE OF ABBREVIATIONS USED TO PROTECT IDENTITY

A.G.—Complaining witness

D.G.—A.G.'s mother

B.O.—A.G.'s maternal grandmother

J.O.—A.G.'s maternal grandfather

S.W.—A.G.'s friend (minor)

G.W.—S.W.'s mother

M.W.—S.W.'s father

T.S.(wife)—A.G.'s sister (adult)

T.S.(husband)—A.G.'s brother-in-law

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Case No. PD-0639-18

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

DAVID R. GRIFFITH,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

To the Honorable Judges of the Court of Criminal Appeals:

David R. Griffith, Appellant, presents this Petition for Discretionary Review.

7. STATEMENT OF THE CASE

The State of Texas charged Appellant with continuous sexual abuse of a child. Tex. Penal Code Ann. § 21.02(b) (West 2011). [CR 10]. The case went to trial in the statutory County Court at Law of Navarro County.[1] Although the complaining

[1] Although this Court did not grant review to address the question of whether the Navarro County Court at Law had jurisdiction to hear this case under the Government Code, this Court has the discretion to address that issue. *See* Tex. R. App. P. 67.1. Here, absent an assignment from the district court judge, the County Court at Law did not have jurisdiction to hear this case. *See* Tex. Gov't Code § 26.045(a) ("Except as provided by Subsection (c), a county court has exclusive original jurisdiction of misdemeanors other than misdemeanors involving official misconduct and cases in which the highest fine that may be imposed is $500 or less."; and, Tex. Gov't Code § 25.1772(a)(1)(D) ("In addition to the jurisdiction provided by Section 25.0003 and other law,

witness recanted her allegations against Appellant, the jury found Appellant guilty and sentenced him to serve 38 years in the custody of the Texas Department of Criminal Justice. [CR 182].

Appellant appealed this conviction in appellate cause number 10-14-00245-CR. *Griffith v. State*, No. 10-14-00245-CR, 2018 Tex. App. LEXIS 2407, at *1 (Tex. App.—Waco Apr. 4, 2018) (mem. op.) (not designated for publication). The Tenth Court of Appeals affirmed the trial court's verdict. *Id.*

Appellant moved for rehearing, which the intermediate-appellate court denied over the dissent of Chief Justice Gray. [Dissent, 1]. In dissent, Chief Justice Gray wrote:

> Upon rehearing I am persuaded that while there is evidence of two or more sexual assaults, the evidence is insufficient for the jury to reasonably infer that the second assault occurred before the victim's fourteenth birthday. [In this case] the victim recanted. . .
>
> The second assault could have occurred before her [fourteenth] birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after . . . her fourteenth birthday. That is what distinguishes

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and except as limited by Subsection (b), a county court at law in Navarro County has concurrent jurisdiction with the district court in: (1) felony cases to: (D) conduct jury trials on **assignment** of a district judge presiding in Navarro County and acceptance of the assignment by the judge of the county court at law"). **The record contains no evidence of such an assignment.** This Court can resolve this case in a per curium opinion by finding a lack of jurisdiction, vacating the judgment, and remanding this case for trial in a court of competent jurisdiction.

> speculation from inferences. Something that allows the jury to reasonably infer the required finding. (emphasis added.).

[Dissent, 1].

Appellant also filed a petition for writ of mandamus in the Tenth Court of Appeals challenging the trial court's jurisdiction. The intermediate-appellate court denied this petition with a short opinion. *In re: Griffith*, No. 10-18-00131-CR, 2018 Tex. App. LEXIS 3710 (Tex. App.—Waco 2018, orig. proceeding [mand. denied]). Appellant then filed a substantively identical writ of mandamus in this Court, which this Court denied without opinion.

8. ISSUE PRESENTED

This Court granted review to answer the question:

> Whether, as stated by Justice Gray in his dissent from Appellant's motion for rehearing, the evidence allowed the jury to have reasonably inferred that the second assault occurred on or before the victim's fourteenth birthday?

9. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

A.G. was born on April 4, 1999. [6 RR 17; 10 RR 239]. According to Ann Taylor, a CPS investigator, A.G. suffers from idiopathic mental retardation and dyslexia. [7 RR 172; 173]. A.G. struggled in school and was repeatedly unenrolled and educated at home. [7 RR 27]. In December 2013, A.G. claimed that her father had sexually abused her; A.G. recanted this claim quickly.

When A.G. was thirteen years old she and her family moved to Dawson, Texas and attended church in Hubbard, Texas. [5 RR 163-64]. At that church A.G. befriended S.W. [5 RR 163-164]. After an evening service, when A.G. was fourteen years old and in a car on her way to spend the night with S.W., A.G. told S.W. that A.G.'s father had had sex with her.[2] [5 RR 165-66; 169-170]. Later that evening, S.W. told her mother (G.W.) and father (M.W.) about A.G.'s claim. When asked, A.G. repeated the claim to G.W. and M.W. [5 RR 171; 175].

According to G.W., A.G. told her that A.G.'s father had had sex with A.G. and that it had occurred in their shared home in Dawson when A.G. was thirteen. [5 RR 211; 212]. During trial, the following exchange occurred in G.W.'s direct examination:

G.W.	She told me that he had given her sleeping pills and it happened about three or four times. That the first time it happened was in the mobile home where they used to live [i.e. Dawson, Texas].
Attorney for the State:	Did she mention where -- where the mobile home is?
G.W.	It's in Dawson. She said she was at the age of thirteen.

. . .

[2] Griffith contends that he has never committed a sexual assault and the complaining witness has recanted her claim. That said, because Griffith has been convicted of committing at least two such assaults, this brief refers to the assaults as if they occurred. This brief uses this wording to comport with the conventional language used in such arguments but in no way should this language be interpreted as Griffith acknowledging that any such assault actually occurred.

G.W.	And then it happened at the place that they resided now [i.e. Frost, Texas] in her parents' room, her sister's room.
. . .	
Attorney for the State:	You said it [first] happened in her sister's room, and it happened in the mobile home in Frost?
G.W.:	In Dawson.
Attorney for the State:	Dawson, that's right. And where else?
G.W.	Her parents' room, her sister's room, and his room.

[5 RR 212-214].

G.W. was clear, however, that A.G. did not provide a timeline for the three or four assaults that occurred [5 RR 224], and that A.G. told G.W. that the first assault occurred when she was thirteen but did not attach an age to the subsequent assaults. [5 RR 232-233; 247]. Then G.W. testified that she did not know when the assaults occurred. [5 RR 244; 246-247; 248]. And, in response to a question about where the assaults occurred, G.W. testified that "A.G. told me she lived in a mobile home in Dawson. And I'm not sure whether—where the next place was located at." [5 RR 245].

After reporting the assault to G.W. and M.W., A.G. spent that night, as planned, with S.W. The following morning S.W.'s family took A.G. to her grandmother's (B.O.) home where, on request, S.W. repeated the claim. [5 RR 178]. B.O., A.G.'s maternal grandmother, did not testify concerning when the assaults

occurred but she testified that A.G. was enrolled in the Frost, Texas schools "February, March, April -- something like that" of 2013. [5 RR 9]. B.O. also testified that Appellant moved to Frost in January 2013 and that A.G. sometimes stayed with him, but B.O. could not remember when that happened. [5 RR 14; 6 RR 54; 6 RR 61]. According to B.O., A.G.'s mother and her children, including A.G., moved to Frost to live with Appellant sometime between February and May of 2013. [6 RR 54-55].

G.W. eventually spoke with the minster of the church in Hubbard, the Reverend Jerry Johnson; Reverend Johnson then spoke with A.G. [6 RR 79]. Revered Johnson testified but provided no evidence of when or where the assaults occurred. [6 RR 79-118].

Former Detective S. Fuller testified that he investigated the claims made by A.G. According to former Detective Fuller, he found it "difficult" to establish a timeline for the assaults because A.G. was "in and out of school" in both Dawson and Frost. [7 RR 27]. But he testified that "certain dates on Spring Break for Dawson ISD in 2012" were raised in his investigation and that the holiday was from "March 18th through [the] 22nd." [7 RR 27]. The only evidence that former Detective Fuller provided about where the assaults occurred was that they occurred in Navarro County. [7 RR 61].

The CPS investigator, Amy Taylor, testified that A.G. told the CPS official at the end of December 2013 that the assaults "happened three times in the past year" and that the "last [assault] happened a week and a half and two weeks ago." [7 RR 69; 255; 256; 258; 8 RR 13; 23].

D.G., A.G.'s mother, testified at length. [10 RR 15-139]. D.G. testified on direct exam that she believed that A.G.'s allegations are untruthful. [10 RR 41]. D.G. also testified that A.G. had made similar allegations against a neighbor, which were also untrue. [10 RR 74-75]. D.G. testified that she separated from Appellant for reasons unrelated to A.G.'s claim in January 2012 then she quickly corrected herself and said that she left Appellant in May 2013[3] but maintained that the separation was unrelated to A.G.'s claims. [10 RR 35; 36; 73; 106]. When D.G. testified in July 2014, the attorney for the State asked "[h]ow long have y'all been in that house in Frost?" D.G. answered "A little over a year." [10 RR 47]. D.G. then testified that Appellant moved to Frost in January 2013. [10 RR 73; 106].

A.G. testified that she invented all of the allegations against her father. [10 RR 280]. A.G. testified that when she told her invented story that she claimed that her father had assaulted her "more than four times." [10 RR 249]. And she testified that when she made her false outcry that she said that the first assault occurred when she lived in Dawson and that it was around the time of her school's spring break in

[3] The dates provided by the witnesses are inconsistent.

2012. [10 RR 252]. Then she testified that when she reported the second-concocted assault, that she claimed that it occurred in her new house in Frost. [10 RR 256].

Lydia Bailey conducted two forensic interviews of A.G. [11 RR 9; 17-18]. In the first interview A.G. contended that the assaults occurred; in the second interview A.G. denied that the assaults occurred. [11 RR 57-58]. The attorney for the State asked Bailey, "was she able to tell you when [the first assault] happened?" Bailey answered, "[s]he could tell me in the sense that she knew kind of what was going on in her life, but the exact date, no.. . . [s]he had some difficulty with the—like the year date but not the—the time around it." [11 RR 24-25]. But Bailey testified that in the first interview that A.G. claimed that the first assault occurred in Dawson and that the last assault occurred in December 2013. [11 RR 25; 32].

Many other witnesses testified but theses witnesses did not testify concerning when or where the assaults occurred:

- The State's experts, Dr. Madeline Byrne and Kimberly Green [12 RR 14-58];
- J.O., A.G.'s grandfather, provided no relevant testimony [9 RR 236-237];
- M.W.'s short testimony did not concern when the assaults occurred. [9 RR 204-233];
- Detective J. Earles testified but provided no evidence concerning the chronology, history, or location of the assaults [10 RR 140-238];
- Appellant's first witness, S.G., provided no evidence of when the assaults occurred. [12 RR 60-66];

- Appellant's next witness T.S.[4] (husband), A.G.'s brother-in-law, provided no evidence of when the assaults occurred but testified that A.G. had accused him of raping her to "tease" his wife (A.G.'s sister and Appellant's daughter). [12 RR 67-75; 74];

- Appellant's next witness, T.S.(wife), provided no evidence of when or where the assaults occurred. [12 RR 76-84];

- Appellant's expert witness, Dr. Stephen Thonre provided no such evidence either. [12 RR 84-202]; and,

- Ashton Mitchell and Ashley Pruett, witnesses for Appellant, also had no information on when or where the assaults occurred. [12 RR 202-206; 206-232].

The parties rested and the trial court prepared its charge. The County Court at Law's charge read, in relevant part:

> You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that-
>
> 1. In Navarro County, Texas. the defendant committed two or more of the following acts of sexual abuse against a child younger than 14 years of age, namely Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's finger; Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's sexual organ; and Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, to contact the mouth of the defendant.
>
> The acts of sexual abuse alleged are aggravated sexual assault.
>
> The state must prove, beyond a reasonable doubt, two elements. The elements are that-
>
> a. the defendant intentionally or knowingly caused the penetration of

[4] This witness' wife has the same initials. For clarity they will be T.S. (husband) and T.S. (wife).

the sexual organ of a child by the defendant's sexual organ, by the defendant's finger, or to contact the mouth of the defendant; and

b. the child was younger than fourteen years old.

2. these acts were committed during a period that was thirty or more days in duration, to wit: during a period between on or about March 1, 2012 through April 3, 2013; and

3. at the time of commission of each of the acts of sexual abuse the defendant was seventeen years old or older; and

4. at the time of commission of each of the acts of sexual abuse the victim was a child younger than fourteen years old.

You must all agree on elements 1, 2, 3, and 4 listed above.

With regard to element 1, you need not all agree on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. You must, however, all agree that the defendant committed two or more acts of sexual abuse.

With regard to element 2, you must all agree that at least thirty days passed between the first and last acts of sexual abuse committed by the defendant.

If you all agree the state has proven, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant "guilty" of continuous sexual abuse.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant "not guilty" of continuous sexual abuse.

[CR 143-144]. (emphasis added).

The charge then included a variety of lesser-included offenses. [CR 144-151].

The jury found that Appellant committed at least two assaults occurred before A.G.'s fourteenth birthday and convicted Griffith of the offense of continuous sexual

abuse of a child and sentenced him to spend 38 years in the custody of the Texas Department of Criminal Justice without the possibility of parole. Tex. Gov't Code Ann. § 508.145 (West 2012). [CR 182].

On direct appeal, Appellant challenged the sufficiency of the evidence to support the claim that Appellant had committed continuous sexual abuse of a child because the evidence was insufficient to support a finding that A.G. was fourteen when two or more of the assaults occurred. Specifically, Appellant argued:

> There were few dates specified by any of the testimony. Appellant concedes that there is evidence (the outcry statements to Ms. Washburn and Ms. Bailey) that the first incident could have happened during the dates alleged while the alleged victim was yet thirteen. Ms. Bailey testified that the alleged victim told her that Appellant had put his mouth on her vagina when she lived at the house in Dawson, a trailer house that her grandmother owned. (11 RR 26). Evidence was elicited that the family moved from this home in January of 2013, before the alleged victim turned fourteen. Further, Ms. Washburn testified that the alleged victim said her father had sex with her. She indicated that she established with the alleged victim that by sex she meant that he put his penis in her vagina. She said the alleged victim told her it first happened at the house in Dawson when she was thirteen. (5 RR 212). She testified over objection that the alleged victim said it happened three or four times. She testified that the timeframe was thirteen to fourteen years of age but she could not distinguish whether the second, third or fourth time occurred when the alleged victim was thirteen or fourteen. (5 RR 212, 232, 244). Based on these two outcry statements, the jury could not have determined or inferred that the second, third or fourth incident occurred when the alleged victim was yet thirteen. The victim testified that she told Mr. Washburn, the pastor, her grandmother, her mother and then Lydia Bailey that her father had sex with her. She described what could be inferred by the jury as penetration as contemplated by the statute. She admitted she probably told Lydia Bailey that he put his mouth on her vagina. And she admitted that she told these folks that "it" happened "more than four" times. However, she did not admit that she ever said it happened when she was thirteen. She said she did not remember what months or years she told people. No other evidence was admitted

> regarding a timeframe for the second alleged incident other than after the family moved into the house in Frost. Although there was evidence outside the presence of the jury that the third alleged incident happened a few weeks prior to the fourth alleged incident, that evidence was not ever presented to the jury. So, for the third, there is also no evidence upon which to infer a specific date prior to April 4, 2013. Even the state's theory, which was never communicated to the jury, was that the third incident was in September – October 2013, which is after April 4, 2013. The alleged victim told Ms. Bailey that the third incident was a few weeks before the fourth, and the second was six to seven months before that. This was also not presented to the jury. The state's theory was that the victim was mistaken about the few weeks and that the third incident was really in September-October which would put the second 6-7 months prior which would put the second incident in February to April. They based that on the alleged victim's statement to Lydia Bailey that the third incident was when she was home schooled and it was hot outside. School records confirm that the child was removed from school on September 18, 2013 to be homeschooled. But clearly the State is delusional that it cannot be hot in Texas even in November. With regard to the fourth incident, the evidence clearly showed that it was weeks prior to the outcry which was clearly after the alleged victim was fourteen. The state has tried to stretch the evidence to make these allegations fit with this offense, but even in theory, it is all mere speculation. And even the speculation was not presented to the jury. All the jury had was three to four times, the first time at thirteen at the home in Dawson, the second and third time sometime after they moved to Frost in January 2013, and the fourth in December 2013. Recall that the alleged victim claims it never happened at all. She made it all up for attention. There is simply no evidence that would allow the jury to make the determination that any of these alleged incidents other than the first, happened prior to April 4, 2013 other than through pure speculation or chance. Therefore, the evidence is insufficient to support Appellant's conviction for continuous sexual abuse of a child or children and the trial court erred in denying Appellant's Motion for Directed Verdict. Appellant's Second Issue should be sustained and his conviction overturned and a judgment of acquittal entered.

[Appellant's Brief, 28-31].

The State argued that the evidence was sufficient to support the required finding that at least two assaults occurred before A.G. was fourteen because:

> The jury also had sufficient evidence from which to make the rational deduction that two or more or the acts of sexual abuse occurred before the victim turned fourteen years of age. Glenda Washburn testified that the victim had told her that "it happened about three or four times," and that she was thirteen years old the first time the sexual abuse happened. Lydia Bailey testified that the victim said that "[s]he lived in Dawson" when the first act of sexual abuse occurred, and Appellant concedes that the evidence at trial showed that "the family moved from this home in January of 2013, before the alleged victim turned fourteen." Had the jury believed either Mrs. Washburn or Ms. Bailey, then it was rational when it found that the first sexual assault occurred sometime before January 2013, when the victim was still thirteen. From this point, the question for the Court is simply: could a rational jury have determined that the second sexual assault occurred sometime in the approximately three full months between when the victim moved from Dawson in January 2013 and when she turned fourteen on April 4, 2013.

[State's Brief, 22].

The intermediate-appellate court affirmed the verdict. The intermediate-appellate court wrote:

> Bailey testified that A.G. told her that the first incident of sexual abuse by Griffith occurred during Spring Break in 2012 when A.G.'s family was living in a mobile home in Dawson, Texas. Washburn testified that A.G. also told her that the first incident of abuse occurred in Dawson. Bailey and Washburn further testified that A.G. told them that the subsequent incidents of abuse occurred after her family moved to Frost, Texas. Testimony from Donna Griffith, Griffith's wife and A.G.'s mother, and Brenda O'Pry, Donna's mother, established that the move to Frost occurred in January 2013. Seth Fuller, who investigated the case while a deputy with the Navarro County Sheriff's Office, testified that Spring Break in the Dawson schools was from March 18th through 22nd in 2012. A.G. was born on April 4, 1999; therefore, she turned thirteen on April 4, 2012. <u>This evidence was, thus, sufficient for the jury to reasonably conclude beyond a reasonable doubt that the first incident of sexual abuse occurred prior to A.G.'s fourteenth birthday</u>.

> As noted, Bailey and Washburn testified that A.G. told them that subsequent acts of abuse occurred in Frost, Texas. Bailey further testified that A.G., in her outcry statement, had told Donna that Griffith had inappropriately touched her. Donna confirmed that A.G. made such an accusation, although she stated that she thought A.G. was hallucinating due to an overdose of Ambien. Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. The jury could reasonably have concluded from the **foregoing** testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days.

[Slip Op., 5-7].

Appellant filed a motion for rehearing, in which he argued that the evidence was insufficient to support the finding that two or more assaults occurred before A.G.'s fourteenth birthday; the intermediate-appellate court denied the motion over the dissent of Chief Justice Gray. In dissent, Chief Justice Gray wrote:

> Upon rehearing I am persuaded that while there is evidence of two or more sexual assaults, the evidence is insufficient for the jury to reasonably infer that the second assault occurred before the victim's fourteenth birthday. [In this case] the victim recanted. . .
>
> The second assault could have occurred before her [fourteenth] birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after . . . her fourteenth birthday. That is what distinguishes

> speculation from inferences. Something that allows the jury to reasonably infer the required finding. (emphasis added.).

[Dissent, 1].

Appellant sought discretionary review from this Court and this Court granted Appellant leave. This Court now faces the question of whether the evidence was sufficient to have found that at least two of the assaults occurred before Appellant's fourteenth birthday, as required by statute.

10. SUMMARY OF THE ARGUMENT

There is no direct or circumstantial evidence to establish when the second assault occurred and this case does not include any legal presumptions. Therefore, the evidence can only support the jury's verdict if there is an inference built on indirect evidence. But such an inference must establish—based on the record—that the second assault occurred on or before April 4, 2013. And, as Chief Justice Gray wrote, there is no such evidence—and "[i]t matters."

This Court has defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." And this Court has defined speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

The essential question that this Court must answer is did the evidence establish that the second assault occurred in January, February, March, or the first four days of April of 2013, rather than sometime during the latter 26 days of April, or even May or June of 2013? Regrettably, the evidence does not support even an inferential conclusion either way. Instead, when the intermediate-appellate court found the evidence legally sufficient it, like the jury, relied on impermissible speculation. The intermediate-appellate court erred and the evidence is insufficient to support the verdict.

Because the evidence is insufficient to support the verdict, this Court, under *Bowen*, must look to lesser-included offenses to determine whether the judgment should be reformed. If this Court believes that the judgment should be reformed, then the reformed judgment should be for sexual assault and the case should be remanded for a new punishment hearing.

11. ARGUMENT

I. Appellant's Issue

The intermediate-appellate court's opinion relied on speculation and erroneously concluded that there was sufficient evidence for the jury to have reasonably determined that the second assault occurred "between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days." But, as Chief Justice Gray wrote in dissent, "[t]here [was] no evidence to assist the jury in deciding whether [the second assault] happened before or after [A.G.'s fourteenth birthday]. [And] [i]t matters." For this reason the intermediate-appellate court erred.

A. Definition of Inference and Speculation

The resolution of the question facing this Court turns largely on the distinction between an inference and speculation.

In *Hooper* this Court defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." And, in *Hooper*, this Court has defined speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper*, 214 S.W.3d at 15.

B. Standard of Review

This Court reviews the legal-sufficiency of the evidence by considering all of the evidence produced at trial—in the light most favorable to the verdict—to

determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Nelson*, 405 S.W.3d at 122 (citing *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89, 61 L. Ed. 2d 560 (1979)). In conducting a legal-sufficiency analysis, this Court's role is to provide a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Id.* (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)). In doing so, this Court gives deference to the responsibility of the fact-finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.* This Court defers to the fact-finder's resolution of conflicting evidence unless the resolution is not rational. *Id.* (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). However, this Court's duty requires it to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense for which he was accused. *Id.*

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13. An inference, including one from circumstantial evidence, is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id.* at 16. On the other hand, speculating is mere theorizing

or guessing about the possible meaning of the facts and evidence presented. *Id.* A conclusion that has been reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id.*

In 2010, in *Brooks*, this Court acknowledged that no meaningful distinction existed between a factual-sufficiency analysis and a legal-sufficiency analysis. In reaching this conclusion, this Court wrote:

> the factual-sufficiency standard from *Watson* may be reformulated as follows: 'Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt.' This is the *Jackson v. Virginia* legal-sufficiency standard. There is, therefore, no meaningful distinction between the *Jackson v. Virginia* legal-sufficiency standard and the *Clewis* factual-sufficiency standard, and these two standards have become indistinguishable.

Brooks v. State, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010).

In *Adames*, this Court explained that in a federal due process evidentiary sufficiency review, a reviewing court must view all of the evidence—and not just the evidence that supports the verdict. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). This evidence is viewed in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

This Court explained in *Hooper* that in making a legal-sufficiency determination,

juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeals understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic facts are established regarding his conduct after receiving the vehicle. A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. (emphasis added).

Hooper, 214 S.W.3d at 15–16.

This Court continued:

Without concrete examples, it can be difficult to differentiate between inferences and speculation, and between drawing multiple reasonable inferences versus drawing a series of factually unsupported speculations. This hypothetical might help clarify the difference. A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible

> speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances. (emphasis added).

Id. at 16.

This Court measures the sufficiency of the evidence against the elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

C. Elements of Hypothetically Correct Charge

To establish continuous sexual abuse of a child, the State must prove: (1) the defendant committed two or more acts of sexual abuse, (2) during a period that is 30 or more days in duration, and (3) at the time of the commission of each of the acts of sexual abuse, the defendant was 17 years of age or older and the victim was a child younger than 14 years of age. *Williams v. State*, 305 S.W.3d 886, 889 (Tex. App.—Texarkana 2010).

D. Facts

The overwhelming proportion of evidence did not concern when or where the assaults occurred. And the witnesses who testified concerning when or where the

assaults occurred testified that A.G. did not provide a clear answer for either of these questions. [5 RR 232-33; 244; 245; 247; 248; 7 RR 27; 61; 69; 255; 256; 258; 8 RR 13; 23; 10 RR 47; 252; 256; 11 RR 23-25; 32].

It is, however, undisputed that A.G. turned fourteen on April 4, 2013. [6 RR 17; 10 RR 239]. According to A.G., the assaults did not occur, but she testified that when she told her concocted story that she said that the second assault occurred in her new home in Frost. [10 RR 256].

D.G. testified that she left Appellant, for reasons unrelated to A.G.'s claims, in January 2012 but then clarified that she left Appellant in May 2013 and moved to Frost. [10 RR 35-36]. In July 2014, D.G. testified that she had been in the house in Frost for "[a] little over a year." [10 RR 47].

B.O. testified that Appellant moved to Frost in January 2013 and that A.G. sometimes stayed with him there and that D.G. and the rest of the family moved to Frost sometime between February and May 2013. [6 RR 54-55]. B.O. also testified that the children were enrolled in the Frost schools sometime between February and April of 2013 or "something like that." [5 RR 9].

G.W. testified, in a confused manner, about where the assaults occurred. Her testimony was:

G.W. She [A.G.] told me that [Appellant] had given her sleeping pills and it happened about three or four times. That the *first* time it happened was in the

	mobile home where they used to live [i.e. Dawson, Texas].
Attorney for the State:	Did she mention where -- where the mobile home is?
G.W.	It's in Dawson. She said she was at the age of thirteen.

. . .

G.W.	And then it [later] happened at the place that they resided *now* [i.e. Frost, Texas] in her parents' room, her sister's room

. . .

Attorney for the State:	You said it happened in her sister's room [in Frost], and it happened in the mobile home in Frost?
G.W.:	In Dawson.
Attorney for the State:	Dawson, that's right. And where else?
G.W.	Her parents' room, her sister's room, and his room.

[5 RR 212-214].

Bailey provided the clearest testimony on when the assaults occurred. She testified that A.G. reported that the first assault occurred sometime when the family lived in Dawson and that the final assault occurred in December 2013. [11 RR 25; 32].

During her closing argument, the attorney for the State contended that the second assault occurred in A.G.'s sister's room in Frost and that A.G.'s family was in Frost by January 2013. [13 RR 91].

E. Application of Law to Fact

The State had the burden to show that (1) Appellant committed two or more acts of sexual abuse and (2) at the time of the commission of each of the acts of sexual abuse, A.G. was a child younger than 14 years of age. *Williams*, 305 S.W.3d at 889.

All parties agree that the evidence supports a finding that more than one assault occurred. And all parties agree that the evidence supports a finding that the first assault occurred when A.G. was thirteen years old. Finally, all parties—including the intermediate-appellate court—agree that the second assault occurred in Frost. [13 RR 91; State's brief 22-23; Slip Op., 5-7].

The essence of the existing disagreement is when the second assault occurred relative to A.G.'s fourteenth birthday. In other words, did the second assault occur in January, February, March, or the first four days of April of 2013, or did the assault occur sometime during the latter 26 days of April, or even May or June of 2013? Regrettably, the evidence does not support a rational conclusion either way.

In its claim that the evidence is sufficient to support the verdict, the State argued that:

> Clearly, *any* rational jury could have concluded that the Appellant sexually assaulted his daughter in the three months before she turned fourteen after the family's move from Dawson to Frost. The jury could have made this conclusion on a number of different bases, including but not limited to: Lydia Bailey's testimony, including her demeanor and tone of voice when she recounted the timeline that the victim was able

> to provide her; Glenda Washburn's tone of voice and demeanor when she stated that the victim had told her 'it happened about three or four times. . .' extensive testimony about how the Appellant failed to adequately address his alleged 'sexomnia,' or numerous other theories. (italics original).

[State's Brief, 23-24].

The intermediate-appellate court agreed, writing:

> Donna [D.G.] also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry [B.O.] also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. The jury could reasonably have concluded from the foregoing testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days.

[Slip Op., 6].

On rehearing, Chief Justice Gray explained the evidentiary problem correctly when he stated,

> The second assault could have occurred before her [fourteenth] birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after . . . her fourteenth birthday. That is what distinguishes speculation from inferences. Something that allows the jury to reasonably infer the required finding.

[Dissent, 1].

Neither the briefing nor the opinion directs readers to a portion of the record that could have rationally provided the jury with specific evidence of when the second assault occurred. *Adames*, 353 S.W.3d at 860. G.W.'s confused testimony appears to address this issue but it fails to deliver on its promise. She testified that:

- the first assault occurred in the family home in Dawson but G.W. did not testify where in the home the assault occurred. [5 RR 212];
- the next assault occurred in "the place that they resided now," meaning in Frost, Texas and that these assaults occurred in A.G.'s sister's room and in A.G.'s parents' room. [5 RR 214]; and,
- the assaults occurred "in her parents' room, her sister's room, and Appellant's room." [5 RR 214].

G.W.'s testimony lacks clarity but it supports the undisputed notion that the first assault occurred in Dawson and that the second assault occurred in Frost. The testimony about the rooms in which the assaults occurred provides no evidence of when or even in what city the assaults occurred in. [5 RR 212-214]. Thus, G.W.'s testimony does not resolve the issue of when the second assault occurred. *Id.; Nelson*, 405 S.W.3d at 122.

Because there is no direct or even circumstantial evidence of specifically when the second assault occurred, all parties appear to agree, as did the intermediate-appellate court, that the only way for the verdict to stand is for some conglomeration of indirect evidence to allow for an inference that the second assault occurred on or before April 4, 2013 (this case does not involve a legal presumption).

This Court has defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." *Hooper*, 214 S.W.3d at 15–16. And this Court has defined speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.*

This Court's hypothetical example from *Hooper* is instructive in applying these definitions. In this hypothetical, this Court posited that

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances. (emphasis added).

Id. at 16.

Here, the intermediate-appellate court correctly inferred that the first assault occurred before April 4, 2013 because there was 1) evidence that the assault occurred while A.G. lived in Dawson; and, 2) evidence that A.G. moved from Dawson in January 2013. Therefore, based on this evidence, the intermediate-appellate court could reasonably infer that the evidence was sufficient for the jury to have found that the first incident occurred on or before April 4, 2013.

But the intermediate-appellate court's inferential conclusion that the second incident occurred on or before April 4, 2013 and not sometime in the remaining 26 days of April or in May or even in June of 2013 is not well founded and is equivalent to the hypothetical in *Hooper*, where this Court wrote:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her.. . . If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. (emphasis added).

Id.

Here, the possibility that the second assault occurred sometime after April 4, 2013 is the logical equivalent of the "other people with smoking guns in the room" from this Court's hypothetical. Absent additional evidence (such as, in *Hooper*, that "the other guns in the room are toy guns and cannot shoot bullets") of when the

second assault occurred, "[n]o rational juror should find beyond a reasonable doubt that [the second assault occurred on or before April 4, 2013]. To do so would require impermissible speculation." *Id.* And, in this case, as explained by Chief Justice Gray, "The second assault could have occurred before her [fourteenth] birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters." [Dissent, 1].

The "additional evidence" of when the second assault occurred is:

- testimony from B.O. that Appellant moved to Frost in January 2013 and that A.G. sometimes stayed with him there and that D.G. and the rest of the family moved to Frost sometime between February and May 2013 [6 RR 54-55];

- testimony from B.O. that A.G. and the children were enrolled in the Frost schools sometime between February and April of 2013 or "something like that" [5 RR 9];

- testimony from Former Detective S. Fuller that spring break for Dawson ISD in 2012 was between March 18 and March 22 [7 RR 27] and A.G.'s testimony that the <u>first</u> assault occurred during this holiday [10 RR 252];

- testimony from Amy Taylor that A.G. claimed, in December 2013, that the assaults occurred three times during 2013 and the most recent of those occurred in November or December of 2013 [7 RR 69; 255; 256; 258; 8 RR 13; 23];

- G.W.'s testimony that she did not know when the assaults occurred [5 RR 244, 246-247; 248];

- G.W.'s confused testimony that the assaults occurred in A.G.'s ". . . parents' room, her sister's room, and, his room" [5 RR 212-214]; and,

- Testimony from D.G. and B.O. that A.G. and her sisters went back and forth between B.O.'s house, where D.G. had moved, and the Frost house, where Appellant lived after D.G. left him.

None of this evidence allowed the jury or the intermediate-appellate court to rationally conclude that the second assault occurred on or before April 4, 2013 and, instead, such a conclusion is based on mere speculation. While "[a] conclusion reached by speculation may not be completely unreasonable"—and here it is possible that the intermediate-appellate court's speculative conclusion is correct—the evidence remains legally insufficient to support the verdict. *Id*. at 15-16. Therefore, the intermediate-appellate court erred and, as Chief Justice Gray wrote, "[i]t matters."

F. Conclusion

For this reason, Appellant urges this Court to find that the evidence was legally insufficient to support the verdict, to vacate the judgment, and to render a judgment of acquittal, or, in the alternative, to reform the judgment to reflect a conviction for a lesser-included offense.

II. Remedy

A. Law

1. Law for Reforming Judgments

The trend in this Court has been that when the evidence is found legally insufficient to support a conviction that instead of rendering judgment of acquittal,

this Court evaluates the evidence to determine whether it supports a conviction for a lesser-included offense. *See Bowen v. State*, 374 S.W.3d 427, 429 (Tex. Crim. App. 2012).[5]

Bowen concerned the misappropriation of fiduciary funds. In *Bowen*, this Court overruled *Collier*, which had held that "an appellate court does not have the authority to reform a judgment to reflect a conviction of a lesser-included offense if it was neither requested nor submitted in the jury charge." *Bowen*, 374 S.W.3d at 429. Instead, the *Bowen* court found the evidence legally insufficient to support the existing conviction and held:

> the State has met its burden by proving the essential elements of the offense of misapplication of fiduciary property beyond a reasonable doubt, but the amount of property shown to have been misapplied, an aggravating element of the offense, was legally insufficient to support a first-degree felony conviction. The value of the property misapplied was approximately $103,344, which supports a felony conviction in the second degree. Accordingly, the judgment must be reformed to reflect a second-degree felony conviction.

Id. at 432.

[5] Appellant acknowledges this Court's opinion in *Britain*. *Britain v. State*, 412 S.W.3d 518, 521 (Tex. Crim. App. 2013). Appellant also acknowledges that *Britain* would produce a more desirable result for his case. But Appellant believes that this case is analogous to *Bowen* rather than *Britain*. Ultimately, in *Britain*, the evidence was insufficient to support a finding that the appellant acted recklessly or negligently. Here, while Appellant disputes that these offenses occurred, there is legally-sufficient evidence to support the finding that Appellant acted with the requisite mental state for the lesser offense of sexual assault.

Similarly, in *Thornton*, this Court explained that "post-*Bowen*,. . . [t]he focus is now on the evidence presented and the lesser-included conviction sought, rather than the parties' respective strategies in failing—or deciding whether—to seek an instruction at trial." *Thornton v. State*, 425 S.W.3d 289, 297 (Tex. Crim. App. 2014). This Court then wrote:

> [i]n summary, then, after a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized—indeed required—to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense.

Id. at 300.

Therefore, this Court must engage in a three step process. This Court must: 1) determine "the lesser-included conviction sought;" 2) determine whether in the course of convicting Griffith of a criminal offense without all of the required evidence whether the jury that made the erroneous determination "must . . . have necessarily found every element necessary to convict [Griffith] for the lesser-included offense; and, 3) conduct an evidentiary analysis sufficient to support a

conviction for the lesser-included offense that this Court elects to pursue against Griffith.

This Court's precedent does not establish which lesser-included offense this Court should pursue against a defendant when the evidence is insufficient to support the existing conviction. *Thornton* and *Bowen* establish that the conviction in the reformed judgment need not be a requested-lesser-included offense. *Id.* at 293; *Bowen*, 374 S.W.3d at 428–29 ("a lesser charge was not submitted to the jury."). The only-specific direction that precedent provides is that the reformed judgment must be a lesser-included offense of the vacated offense. *Thornton v. State*, 425 S.W.3d 289, 293 (Tex. Crim. App. 2014); *Bowen*, 374 S.W.3d at 429. Precedent, however, provides no direction on which lesser-included offense should be selected if more than one lesser-included offense exists for the charge in the original judgment.

In *Thornton* and *Bowen* this Court selected offenses that were one-punishment level below that of the original offense. *Thornton*, 425 S.W.3d at 293; *Bowen*, 374 S.W.3d at 429. Appellant urges this Court to provide meaningful direction on the offense that should be in the reformed judgment because courts do not comfortably exercise the prosecutorial discretion to determine what charge a defendant should face. Because courts do not exercise this discretion with ease and only rarely make such a determination, Appellant urges this Court to provide a set of criteria to apply

in making this determination. By providing meaningful direction on the conviction that should be included in the reformed judgment, this Court establishes clear rules that do not require lower courts to exercise prosecutorial discretion and instead allow the lower courts to act as disinterested entities concerned only with the application of the law to the facts of a case.

2. Aggravated Sexual Assault and Sexual Assault

A person commits aggravated sexual assault if the person intentionally or knowingly causes the penetration of a child's sexual organ by any means or causes the person intentionally or knowingly causes the sexual organ of a child to contact the mouth of another person, including the actor, and the child is younger than 14 years of age and not the spouse of the actor. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii) (West 2011). The tongue is part of the mouth for purposes of this statute. *See Montoya v. State*, 841 S.W.2d 419, 422 (Tex. App.—Dallas 1992) (op. on reh'g), *reversed on other grounds*, *Montoya v. State*, 906 S.W.2d 528, 529 (Tex. Crim. App. 1995).

A person commits sexual assault of a child if the person intentionally or knowingly causes the penetration of a child's sexual organ by any means or causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor. Tex. Penal Code Ann. §§ 22.011(a)(2)(A),

(a)(2)(C) (West 2011). A "child" for purposes of this statute is a person younger than 17 years of age who is not the spouse of the actor. *Id.* § 22.011(c)(1) (2011).

B. Facts

Here, the jury charge instructed the jurors:

> Accusation
>
> The state accuses the defendant of having committed the offense of continuous sexual abuse of young child or children. Specifically, the accusation is that in Navarro County, Texas, the defendant during a period that was 30 or more days in duration, specifically from on or about March I, 2012 through April 3, 2013, when the defendant was 17 years of age or older, committed two or more acts of sexual abuse against a child younger than 14 years of age, namely, Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's finger; Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's sexual organ; and Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, to contact the mouth of the defendant. [sic.].
>
> Relevant Statutes
>
> A person commits an offense if-
>
> 1. during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> 2. at the time of the commission of each of the acts of sexual abuse, the actor is seventeen years old or older and the victim is a child younger than fourteen years old.
>
> To prove that the defendant is guilty of continuous sexual abuse of young child or children, the state must prove, beyond a reasonable doubt, four elements. The elements are that-

1. the defendant committed two or more acts of sexual abuse; and

2. these acts of sexual abuse were committed during a period that is thirty or more days in duration; and

3. at the time of commission of each of the acts of sexual abuse the defendant was seventeen years old or older; and

4. at the time of commission of each of the acts of sexual abuse the victim was a child younger than fourteen years old.

[CR 142].

The County Court at Law then included the application portion of the charge which read:

> In Navarro County, Texas, the defendant committed two or more of the following acts of sexual abuse against a child younger than 14 years of age, namely Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's finger; Aggravated Sexual Assault of a Child by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, by the defendant's sexual organ; and Aggravated Sexual Assault of a Child **by intentionally or knowingly causing the penetration of the sexual organ of [A.G.], a child, to contact the mouth of the defendant**. [sic.].

[CR 143].

> The acts of sexual abuse alleged are aggravated sexual assault. The state must prove, beyond a reasonable doubt, two elements. The elements are that-
>
> a. the defendant intentionally or knowingly caused the **penetration** of the sexual organ of a child by the defendant's sexual organ, by the defendant's finger, or to **contact** the mouth of the defendant; and

b. the child was younger than fourteen years old.

[CR 143-144].

And then the charge instructed the jurors that "With regard to element 1, you need not all agree on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. You must, however, all agree that the defendant committed two or more acts of sexual abuse." (emphasis added). [CR 144].

C. Application of Law to Fact

In deciding which offense to reform the judgment to reflect, this Court must ask: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant of the lesser-included offense; and, 2) after conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that new, lesser offense? *Thornton*, 425 S.W.3d at 297. "[I]f the answers to both are yes, [then] the court is authorized—indeed required—to avoid the 'unjust' result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Id.*

A person commits aggravated sexual assault if the person intentionally or knowingly causes the penetration of a child's sexual organ by any means or causes the person intentionally or knowingly causes the sexual organ of a child to contact the mouth of another person, including the actor, and the child is younger than 14

years of age and not the spouse of the actor. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii); § 22.021(a)(2)(B) (West 2011). A person commits sexual assault of a child if the person intentionally or knowingly causes the penetration of a child's sexual organ by any means or causes the sexual organ of a child to contact the mouth of another person, including the actor. *Id.* §§ 22.011(a)(2)(A), (a)(2)(C) (2011). A "child" for purposes of this statute is a person younger than 17 years of age who is not the spouse of the actor. *Id.* § 22.011(c)(1) (2011).

The jury found Appellant guilty of continuous sexual abuse of a child and did not consider the individual lesser-included offenses. [CR 146; 147; 149; 151].

Faced with insufficient evidence to support the existing verdict, this Court must ask whether "in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense?" *Thornton v. State*, 425 S.W.3d 289, 297 (Tex. Crim. App. 2014).

The two lesser-included offenses considered here are aggravated sexual assault and sexual assault (other lesser-included offenses also exist). The principal difference in these lesser-included offenses is the age of the complaining witness. *Cf.* Tex. Penal Code Ann. § 22.021(a)(2)(B) (2011) ("the victim is younger than 14 years of age, regardless of whether the person knows the age of the victim at the time

of the offense") with Tex. Penal Code Ann. § 22.011 (2011) (not distinguishing between children from age 14 to 17).[6]

Here there is no evidence of which offenses the jury convicted appellant of committing. There is evidence that one such incident occurred before A.G.'s fourteenth birthday but it cannot be said that the jury necessarily convicted Appellant of that offense. Instead, all that can be said is that the jury convicted Appellant of at least two such offenses but this Court cannot be certain which two. And it is necessarily true that the jury convicted Appellant of at least one offense (and possibly two or more) for which there was no evidence to determine when the assault occurred relative to A.G.'s birthday. Because the jury was not required to agree to the individual assaults that they used to convict Appellant, because the offenses that the jury relied on for the conviction are not known to this Court, and because there is no evidence of when three of the four assaults occurred relative to A.G.'s fourteenth birthday, under *Bowen* and *Thornton*, the judgment should not be reformed to reflect a conviction for aggravated sexual assault.

Any argument that the jury necessarily relied on the assault that occurred when A.G. lived in Dawson is speculation. While it is not unreasonable to

[6] Section 22.021(c) defines "child" as "'Child' has the meaning assigned by Section 22.011(c)" and Section 22.011(c) defines a "child" as a person under 17, but section 22.021(a)(2)(B) makes a sexual assault an aggravated sexual assault if the victim is under the age of seventeen. *See* Tex. Penal Code § 22.021(a)(2)(B) ("the victim is younger than 14 years of age, regardless of whether the person knows the age of the victim at the time of the offense.").

hypothesize that the jury relied on the assault in Dawson in reaching its verdict, there is no evidence to establish that it necessarily did so. The value of maintaining the integrity of the jury's deliberative process precludes this or any other reviewing court from ever knowing which offenses the jury relied on in convicting Appellant. Indeed this Court cannot even assume that any individual juror (much less the entire jury) relied on the Dawson offense to convict Appellant. For this reason, the evidence does not support reforming the judgment to reflect a conviction for aggravated sexual assault.

Instead, the judgment should be reformed to reflect a conviction for sexual assault; this offense fits the criteria established in *Bowen* and *Thornton*.

A person commits sexual assault if the person intentionally or knowingly

- causes the penetration of the anus or sexual organ of a child (under the age of seventeen) by any means; or,

- causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor.

Under the facts of this case, the jury necessarily found that the defendant penetrated A.G.'s sexual organ with either his sexual organ or finger or that he contacted A.G.'s sexual organ with his tongue and that at all times A.G. was under the age of seventeen. Accordingly, this offense, as opposed to aggravated sexual assault, is the proper lesser-included offense on which to reform the judgment. *Thornton*, 425 S.W.3d at 297.

D. Conclusion

Appellant urges this Court to reverse the judgment and render a judgment of acquittal. But, Appellant acknowledges that *Bowen* and *Thornton* hold that this Court should reform the judgment to reflect a lesser-included offense. For the reasons explained above, that offense should be sexual assault. Therefore, in the alternative to an acquittal, Appellant asks this Court to reverse the judgment of the trial court and to render a judgment that reflects a conviction of sexual assault and to remand this case for a new punishment hearing.

12. CONCLUSION AND PRAYER

This case falls squarely within the admonitions issued by the Court of Criminal Appeals in *Hooper*. Here the evidence allows for reasonable speculation but the evidence does not support the inference that the second assault occurred on or before April 4, 2013. Thus the evidence does not support the verdict. Appellant asks this Court to vacate the existing judgment and to render a judgment of acquittal or, in the alternative, to reform the judgment to reflect the lesser included offense of sexual assault and to remand this case for a new punishment hearing.

Respectfully Submitted,

/s/ Niles Illich

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 15,000 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 11,805 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

This is to certify that on November 15, 2018 that a true and correct copy of this Brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

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Appendix

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Tab One

IN THE
TENTH COURT OF APPEALS

No. 10-14-00245-CR

DAVID R. GRIFFITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law
Navarro County, Texas
Trial Court No. C-35408-CR

MEMORANDUM OPINION

A jury found Appellant David Ray Griffith guilty of continuous sexual abuse of a child and assessed his punishment at thirty-eight years' incarceration. Griffith appeals in four issues. We will affirm.

The basic facts are not disputed. When Griffith's daughter A.G. was fourteen years old, she made an outcry of sexual abuse against him that was reported to Child Protective Services and the Navarro County Sheriff's Office. After Griffith's arrest, A.G. recanted her sexual-abuse claims and subsequently testified at trial that Griffith did not sexually

abuse her. The evidence against Griffith consisted of the testimony from outcry witnesses and others regarding A.G.'s initial claims of abuse, the CPS report regarding A.G.'s claims, and the video of Griffith's interview by law enforcement.

Sufficiency of the Evidence

In his second issue, Griffith argues that the evidence is legally insufficient to support his conviction and that the trial court erred in denying his motion for directed verdict.

A challenge to a trial court's ruling on a motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction and is reviewed under the same standard. *See Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016); *see also Mills v. State*, 440 S.W.3d 69, 71 (Tex. App.—Waco 2012, pet. ref'd). The Court of Criminal Appeals has expressed our constitutional standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793. Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. Finally, it is well established that the factfinder "is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties." *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

We measure the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge for the case. *Cada v. State*, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011). Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.*; *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001). The law as authorized by the indictment means the statutory elements of the charged offense as modified by the charging instrument. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

To prove continuous sexual abuse of a child in this case, the State was required to prove beyond a reasonable doubt that (1) Griffith committed two or more acts of sexual abuse during a period that was at least thirty days in duration, and (2) at the time of the acts of sexual abuse, Griffith was seventeen years of age or older and A.G. was a child younger than fourteen years of age. *See* TEX. PEN. CODE ANN. § 21.02(b) (West Supp. 2017);[1] *see also Buxton v. State*, 526 S.W.3d 666, 676 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The State need not prove the exact dates of the abuse, only that "there were two or more acts of sexual abuse that occurred during a period that was thirty or more days in duration." *Brown v. State*, 381 S.W.3d 565, 574 (Tex. App.—Eastland 2012, no pet.).

There is no dispute that Griffith was over the age of seventeen at all times relevant to this case. Griffith specifically argues that there was insufficient evidence to establish that two or more acts of abuse occurred prior to A.G.'s fourteenth birthday and that, if those acts occurred, they were committed more than thirty days apart.

The evidence regarding what acts of sexual abuse occurred and when they occurred, came through the testimony of outcry witnesses Glenda Washburn, the mother of the friend whom A.G. first told of the abuse, and Lydia Bailey, a forensic investigator with the Children's Advocacy Center. As stated above, A.G. recanted her outcry statements. She testified that Griffith did not sexually abuse her at any time and that she had fabricated the allegations against him. A.G. also denied during her testimony that she told Washburn or Bailey that any acts of abuse occurred before her fourteenth

[1] The statute has been amended since proceedings began against Griffith, but none of those changes affected the statute's application to this case.

birthday. But, the outcry testimony of a child under the age of seventeen is alone sufficient to prove the allegations in the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 38.07(a), (b)(1) (West Supp. 2017); *see also Saldaña v. State*, 287 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2008, pet. ref'd). There is no requirement that the outcry testimony be corroborated or substantiated by the victim or by independent evidence. *Rodriguez v. State*, 819 S.W.2d 871, 874 (Tex. Crim. App. 1991); *see also Eubanks v. State*, 326 S.W.3d 231, 241 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). If a child victim recants her outcry, "it is up to the fact finder to determine whether to believe the original statement or the recantation." *Saldaña*, 287 S.W.3d at 60 (citing *Chambers*, 805 S.W.2d at 461). The factfinder is fully entitled to disbelieve a witness's recantation. *Id*.

Bailey testified that A.G. told her that the first incident of sexual abuse by Griffith occurred during Spring Break in 2012 when A.G.'s family was living in a mobile home in Dawson, Texas. Washburn testified that A.G. also told her that the first incident of abuse occurred in Dawson. Bailey and Washburn further testified that A.G. told them that the subsequent incidents of abuse occurred after her family moved to Frost, Texas. Testimony from Donna Griffith, Griffith's wife and A.G.'s mother, and Brenda O'Pry, Donna's mother, established that the move to Frost occurred in January 2013. Seth Fuller, who investigated the case while a deputy with the Navarro County Sheriff's Office, testified that Spring Break in the Dawson schools was from March 18th through 22nd in 2012. A.G. was born on April 4, 1999; therefore, she turned thirteen on April 4, 2012. This evidence was, thus, sufficient for the jury to reasonably conclude beyond a reasonable doubt that the first incident of sexual abuse occurred prior to A.G.'s fourteenth birthday.

As noted, Bailey and Washburn testified that A.G. told them that subsequent acts of abuse occurred in Frost, Texas. Bailey further testified that A.G., in her outcry statement, had told Donna that Griffith had inappropriately touched her. Donna confirmed that A.G. made such an accusation, although she stated that she thought A.G. was hallucinating due to an overdose of Ambien. Donna also testified that she separated from Griffith after A.G.'s accusation—beginning sometime in January 2013 and lasting until May or June of that year—although she denied that A.G.'s outcry was the reason. Donna and O'Pry also testified that A.G. and her sisters went back and forth between O'Pry's house, where Donna had moved, and the Frost house, where Griffith remained, during the separation. The jury could reasonably have concluded from the foregoing testimony that Griffith sexually abused A.G. a second time between January 2013 and A.G.'s fourteenth birthday on April 4, 2013, and that the period of time between the two incidents of sexual abuse exceeded thirty days.

Having considered all of the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence presented for the jury to find beyond a reasonable doubt that Griffith committed two or more acts of sexual abuse against A.G. when she was younger than fourteen years of age and that the acts occurred more than thirty days apart. Griffith's second issue is overruled.

Outcry Statements

In his first issue, Griffith argues that the trial court erred in allowing witnesses to testify about outcry statements made by A.G. regarding offenses that were allegedly committed against her after she had turned fourteen years of age.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). Outcry testimony is viewed under the same standard. *Garcia v. State*, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990); *see also Jones v. State*, No. 10-13-00106-CR, 2014 WL 3556520, at *1 (Tex. App.—Waco Jul. 3, 2014, pet. ref'd) (mem. op., not designated for publication). "Under an abuse of discretion standard, an appellate court should not disturb the trial court's decision if the ruling was within the zone of reasonable disagreement." *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008). We will uphold an evidentiary ruling on appeal if it is correct on any theory of law that finds support in the record. *Gonzalez v. State*, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006); *Dering v. State*, 465 S.W.3d 668, 670 (Tex. App.—Eastland 2015, no pet.).

Generally, hearsay statements are not admissible unless they fall within the exceptions provided in Rules of Evidence 803 or 804, or they are allowed "by other rules prescribed pursuant to statutory authority." *Sanchez v. State*, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011) (quoting TEX. R. EVID. 802). Article 38.072 of the Code of Criminal Procedure is one statutory authority that permits the admission of an out-of-court statement of a child sexual-abuse complainant "so long as that statement is a description of the offense and is offered into evidence by the first adult the complainant told of the

offense." *Id*.; s*ee also* TEX. CODE CRIM. PROC. ANN. art 38.072 (West Supp. 2017). "Outcry testimony admitted in compliance with article 38.072 is considered substantive evidence and is admissible for the truth of the matter asserted in the testimony." *Buentello v. State*, 512 S.W.3d 508, 518 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *see also Garrett v. State*, No. 12-15-00208-CR, 2017 WL 1075710, at *5 (Tex. App.—Tyler Mar. 22, 2017, no pet.) (mem. op., not designated for publication) (citing *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.—Fort Worth 2005, no pet.)). Outcry testimony is admissible from more than one witness if the witnesses testify about different events. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011). But there may be only one outcry witness per event. *Id*.

A.G.'s accusations against Griffith consisted of four incidents, two of which the trial court determined were committed after A.G. had turned fourteen. After an article 38.072 hearing, the trial court determined that two separate outcry witnesses would be allowed to testify: Washburn and Bailey, who would be permitted to testify about different sexual acts committed against A.G. The trial court also determined that only the two incidents that allegedly occurred when A.G. was younger than fourteen would be admissible—the incident that occurred over Spring Break in Dawson and the incident that occurred after the family moved to Frost.

Over Griffith's objection, Washburn testified that A.G. told her that Griffith had sex with A.G. in three rooms in A.G.'s home: her parent's room, her sister's room, and "his" room. Washburn also testified, without a contemporaneous objection, that A.G. told her that the sexual contact occurred "[t]hree or four times." Bailey testified that A.G. told her that Griffith had sexual contact with A.G. on four separate occasions and that he

placed his mouth on her vagina on each occasion. No other details regarding the third and fourth incidents were elicited by the State from Washburn or Bailey. A.G. recanted all of her claims of sexual abuse when she testified, but she admitted on cross-examination, without objection from Griffith, that she had told Bailey the specific details of the third and fourth sexual encounters.

To preserve error regarding the admission of evidence, a party must make a proper objection and get a ruling. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004). Griffith argues that he was not required to additionally object to the hearsay testimony given by Washburn and Bailey because he objected to the testimony regarding the third and fourth incidents at the article 38.072 hearing. Assuming without deciding that Griffith sufficiently preserved this evidentiary objection, we conclude there was no error.

The violation of an evidentiary rule that results in the erroneous admission of evidence constitutes non-constitutional error. *See Martin v. State*, 176 S.W.3d 887, 897 (Tex. App.—Fort Worth 2005, no pet.). Under Rule of Appellate Procedure 44.2(b), an appellate court must disregard non-constitutional error unless the error affected the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *see also Gerron v. State*, 524 S.W.3d 308, 325 (Tex. App.—Waco 2016, pet. ref'd). A substantial right is affected when the erroneously admitted evidence, viewed in light of the record as a whole, had "a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). In assessing the likelihood that the jury's decision was improperly influenced, we must consider the entire record, including

such things as the testimony and physical evidence admitted, the nature of the evidence supporting the verdict, the character of the error and how it might be considered in connection with other evidence, the jury instructions, the State's theories, defensive theories, closing arguments, voir dire, and whether the State emphasized the error. *Barshaw v. State*, 342 S.W3d 91, 94 (Tex. Crim. App. 2011).

As noted, neither Washburn nor Bailey went into the details of the third and fourth incidents. However, as also previously noted, the details of those incidents were elicited from A.G. without objection. Griffith himself highlighted details of the third and fourth incidents when cross-examining CPS investigator Amy Taylor regarding the details of the CPS report prepared in the case. After examining the record as a whole, we are assured that either the error did not influence the jury or did so only slightly. The testimony was not calculated to inflame the jury's emotions; substantially similar testimony was allowed without objection; the jury charge instructed the jury that it was the sole judge of the credibility of the witnesses and the weight to be given to their testimony; and the jury heard A.G. admit without objection that she told Bailey the details of the third and fourth incidents. *See Flores v. State*, 513 S.W.3d 146, 172 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (psychologist's testimony about credibility of class of persons did not affect defendant's substantial rights as it was not calculated to inflame jury's emotions, substantially similar testimony was allowed without objection, jury charge instructed jury it was sole judge of credibility, and jury heard victim provide detailed account of sexual assault). Griffith's first issue is overruled.

Opinion Testimony

In his third issue, Griffith asserts that the trial court erred in allowing witnesses to comment on the credibility of A.G. and the veracity of her allegations and recantation. Griffith identifies the improper opinion witnesses as: (1) Jerry Johnson, pastor of the church that the O'Pry's and Washburns attended, who made the initial call to CPS regarding A.G.'s allegations; and (2) CPS investigator Taylor.

A direct opinion on the truthfulness of a child victim of sexual abuse, from either a lay witness or an expert witness, is inadmissible. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997); *see also Dauben v. State*, No. 10-13-00044-CR, 2014 WL 2566469, at *2 (Tex. App.—Waco Jun. 5, 2014, pet. ref'd, untimely filed) (mem. op., not designated for publication). A direct opinion as to the truthfulness of a witness "crosses the line" and does more than "assist the trier of fact to understand the evidence or to determine a fact in issue," it decides an issue for the jury. *Dauben*, 2014 WL 2566469, at *2.

Assuming without deciding that eliciting opinions from Johnson and Taylor was error, similar opinions were elicited from other witnesses without objection, including Bailey and Fuller. Bailey testified that she believed that A.G. had been coerced and coached into recanting her claims of abuse. Fuller testified that he believed A.G.'s outcry of abuse was genuine. Additionally, S.W., the friend whom A.G. first told of the abuse, testified that she did not believe that A.G. had made up the allegations of abuse, as did O'Pry.

As previously noted, error in the improper admission of evidence is not critical if the same or similar evidence is admitted without objection at another point in the trial.

Estrada v. State, 313 S.W.3d 274, 302 n. 29 (Tex. Crim. App. 2010); *see Lane*, 151 S.W.3d at 193 (error in admission of evidence is cured where same evidence comes in elsewhere without objection). Because Griffith did not object to similar opinion testimony from other witnesses, any error is harmless. *See Duncan v. State*, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (any error in admitting evidence cured when same evidence comes in elsewhere without objection). Griffith's third issue is overruled.

Admission of CPS Report

In his fourth issue, Griffith argues that the trial court erred in allowing the State to introduce the CPS report compiled in this case because it contained inadmissible hearsay. The trial court admitted the CPS report over Griffith's objection. The State moved to admit the report during Griffith's cross-examination of Taylor, arguing that Griffith had "opened the door" by questioning Taylor regarding information in the report that was derived from hearsay statements. The State identified two areas that Griffith covered during his cross-examination that came directly from the report: (1) a disagreement between CPS and the prosecutor as to whether A.G. should remain in her home even after Griffith moved out; and (2) the conversation between Taylor and A.G. when A.G. first recanted her claims of sexual abuse. The trial court originally ruled the CPS report inadmissible but subsequently permitted introduction of the report, after the details of A.G.'s forensic interview were redacted.

As previously noted, a trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard and will be overruled only if the reviewing court determines that the trial court's ruling was so clearly wrong as to lie

outside the zone within which reasonable people might disagree. *See Bigon*, 252 S.W.3d at 367.

Documents such as the CPS report may qualify as business records under Rule 803(6) of the Rules of Evidence and therefore admissible as an exception to the hearsay rule, but the information contained therein may still constitute inadmissible hearsay. *See* TEX. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."); *see also Cheek v. State*, 119 S.W.3d 475, 479 (Tex. App.—El Paso 2003, no pet.). "When hearsay contains hearsay, the Rules of Evidence require that each part of the combined statements be within an exception to the hearsay rule." *Sanchez*, 354 S.W.3d at 485-86; *see also Barnes v. State*, No. 05-16-01184-CR, 2017 WL 5897746, at *5 (Tex. App.—Dallas Nov. 29, 2017, no pet.) (mem. op., not designated for publication) ("When business records contain 'hearsay within hearsay,' the proponent must establish that the multiple hearsay statements are independently admissible."). Even if a report does not qualify as a business record or if statements in the report are inadmissible as hearsay, the report may become admissible if one side elicits testimony that "opens the door" to the introduction of the report under Rule 107 of the Rules of Evidence. *See Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009). Rule 107, known as the "rule of optional completeness," provides, in pertinent part:

> If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary

> to explain or allow the trier of fact to fully understand the part offered by the opponent.

TEX. R. EVID. 107. The rule permits the introduction of otherwise inadmissible evidence when it is necessary to fully explain a matter that has been raised by the adverse party. *Ibenyenwa v. State*, 367 S.W.3d 420, 423 (Tex. App.—Fort Worth 2012, pet. ref'd). The rule is designed "to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing." *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007). However, the rule is not invoked "by the mere reference to a document, statement, or act." *Id*. To be admitted under the rule, "the omitted portion of the statement must be 'on the same subject' and must be 'necessary to make it fully understood.'" *Pena v. State*, 353 S.W.3d 797, 814 (Tex. Crim. App. 2011) (quoting *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)).

Griffith argues that the State did not claim that his questioning of Taylor left a false impression with the jury or that the jury could have been misled on a particular point. However, when debating the admissibility of the CPS report, the State specifically argued in regard to the conversation between Taylor and A.G., "He wants to pick and choose so the jury only hears she recanted without hearing all of the factors and all of the hearsay that was before and after it." Because Griffith questioned Taylor on only portions of the report, he left the jury with a false impression regarding the conversation with Taylor when A.G. first recanted her claims of abuse. Additionally, Griffith's questions regarding the conversations between Taylor and the prosecutor could have left the jury with the false impression that CPS had determined that A.G. was safe in her home after Griffith

moved out. In a similar case dealing with a child advocacy center videotape of a child victim, our sister court determined that the entire videotape should be admitted when

> (1) defense counsel asks questions concerning some of the complainant's statements on the videotape; (2) defense counsel's questions leave the possibility of the jury receiving a false impression from hearing only a part of the conversation, with statements taken out of context; and (3) the videotape is necessary for the conversation to be fully understood.

Cline v. State, No. 13-11-00734-CR, 2013 WL 398916, at *4 (Tex. App.—Corpus Christi Jan. 13, 2013, no pet.) (mem. op., not designated for publication). In light of the record, we conclude that the trial court did not err in admitting the CPS report under rule 107.

Additionally, once the report was offered, Griffith had the obligation to specifically identify the portions of the report that contained inadmissible hearsay. *See* TEX. R. EVID. 103(a)(1) (stating that party may claim error in ruling to admit evidence only if error affects substantial right and party timely objected and stated specific grounds for objection); TEX. R. APP. P. 33.1(a) (stating that complaints are not preserved for appellate review if not raised to trial court by timely objection that stated grounds for ruling with sufficient specificity to make trial court aware of complaint). When an exhibit contains both admissible and inadmissible material, an objection must specifically refer to the material deemed objectionable. *Flores v. State*, 513 S.W.3d at 174. A general objection to an entire document without specific reference to challenged material does not inform the trial court of a specific objection and does not preserve error for appeal. *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). Griffith made a general hearsay objection to the CPS report, as well as general objections regarding violations of the Confrontation Clause, the Sixth Amendment, and U.S. Supreme Court authority. Although given the

opportunity to specify which portions of the report he specifically found objectionable, Griffith only identified the information provided in one of the intake calls and the criminal history of Donna, an objection that he subsequently withdrew. Even if the trial court sustained his objection to the statements from the intake call, the same information from the second intake call was contained in the report. In light of the foregoing, Griffith's fourth issue is overruled.

Having overruled all of Griffith's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed April 4, 2018
Do not publish
[CRPM]

Tab Two

IN THE
TENTH COURT OF APPEALS

No. 10-14-00245-CR

DAVID R. GRIFFITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law
Navarro County, Texas
Trial Court No. C-35408-CR

ORDER ON REHEARING

Appellant has filed a Motion for Panel Rehearing.

Having considered the motion, Appellant's motion for panel rehearing is denied by the Court. *See* TEX. R. APP. P. 49.3.

PER CURIAM

Before Chief Justice Gray,*
Justice Davis, and
Justice Scoggins
Motion denied
Order issued and filed May 23, 2018

*(Chief Justice Gray dissents. A separate opinion will not issue. He provides the following note:

Upon rehearing I am persuaded that while there is evidence of two or more sexual assaults, the evidence is insufficient for the jury to reasonably infer the second assault occurred before the victim's fourteenth birthday. Because the victim recanted prior to trial, the State had to rely on the victim's out-cry statements. The testimony about the out-cry statements established two locations where the victim lived at the time of the assaults, but the out-cry statements did not clearly establish the dates each assault occurred. Based on other evidence the dates the assaults could have occurred were bracketed by where the victim was living at the time of each assault. The victim had her fourteenth birthday when she lived at the second location. She was also living at the second location when the second assault occurred. The second assault could have been before her birthday. It could have been after. There is no evidence to assist the jury in deciding whether it happened before or after. It matters. Thus, it may be reasonable to speculate the second assault occurred before her fourteenth birthday. But it is just as reasonable to speculate that it occurred after her fourteenth birthday. And there is no evidence to help or point the jury to a reasonable inference that the second sexual assault occurred after she was living at the new location and before her fourteenth birthday. That is what distinguishes speculation from inferences. Something that allows the jury to reasonably infer the required finding. Recognizing that the State is entitled to file a response before a motion for rehearing is granted, I would request a response.

I respectfully dissent to the denial of the motion for rehearing.)